

Loar v. DHS

The Issue

Sherry Loar, Paulette Silverson and Michelle Berry run successful day care operations out of their homes in Petoskey, Brighton and Flint, Mich. They enjoy the American dream of running their own businesses and provide an important service to parents and children in their communities. They do not work for the state of Michigan, and aside from the parents who hire them, they do not work for an employer.

Or so they thought. Much to their surprise, in December 2008 these women were notified by mail that they were dues-paying members of the newly formed Child Care Providers Together Michigan union, a joint enterprise of the United Auto Workers and American Federation of State, County and Municipal Employees. Loar, Silverson, Berry and 40,000 other home-based day care providers in Michigan are now seeing a total of \$3.7 million annually taken from their paychecks by the Michigan Department of Human Services and given to the union.

How did people who run independent businesses out of their own homes become union members? It wasn't easy, but the unions and the DHS found a circuitous and novel way. Bear with us as we unravel the scheme.

The Child Care Providers Together Michigan was formed in or around 2006 with the intent of organizing "[a]ll home-based child care providers." In July 2006, the DHS entered into an interlocal agreement with Mott Community College to create the Michigan Home Based Child Care Council. This, from all appearances, is a government "shell corporation" designed to get around possible political and constitutional obstructions to the arrangement. In September 2006, CCPTM filed a petition with the Michigan Employment Relations Commission seeking to organize against the MHBCCC.

MERC conducted a vote by mail in October and November 2006. Of the 40,500 home day care providers who would be effected by this decision, 6,396 voted. The outcome was 5,921 in favor of the union and 475 opposed. Neither Loar, Silverson nor Berry believes they were aware of or voted in that election.

In 2008, the CCPTM and the MHBCCC entered into what they called "a collective bargaining agreement." The mechanism for collecting "union dues" was through child care subsidy payments made to needy families with children in home day care. When those payments were passed on to Loar, Silverson and Berry, dues were withheld. The Michigan Department of Human Services began collecting the dues in January 2009.

So because these business owners provided day care for the children of parents who receive day care subsidies through the DHS, they were shanghaied into a union they had not heard of, had not voted for and that does not bargain on their behalf. The creation of the interlocal agreement between a state agency and a community college provided the legal mechanism through which the unions accomplished this.

In September 2009, the Mackinac Center Legal Foundation brought suit against the DHS and its director on behalf of Loar and another day care owner, Dawn Ives (more on Dawn later).

The Court of Appeals dismissed the case without comment in December 2009. Mackinac Center Legal Foundation Director Patrick Wright is considering other legal options.

Chain of Events

On Sept. 16, 2009, the Mackinac Center Legal Foundation, the newly created public-interest law firm of the Mackinac Center for Public Policy, filed a lawsuit at the Michigan Court of Appeals, seeking to prevent the Michigan Department of Human Services from improperly diverting to a union a portion of the subsidy payments to home day care providers. This case initially involved two day care providers and may set a precedent that prevents more than 40,000 home-based day care providers from inappropriately having "dues" taken from their subsidized child care payments because of the creation of a government "shell corporation" formed to facilitate the unionization attempt.

The original plaintiffs were Sherry Loar and Dawn Ives, both of whom were raised in union households and reside in Petoskey. Loar has operated her home day care business since 1994. She is currently licensed to care for seven to 12 children at a time. Ives ran her home day care business from 2004 to late 2009 and was certified to care for one to six children at a time.

This case arose out of an attempt to unionize all home-based day care providers. These providers work at their homes and offer day care services for a fee. The amount of that fee and the hours that the care will be provided for are negotiated between the child's parent(s) and the provider. Some low-income parents receive a state subsidy for day care.

The subsidy is partially funded by the federal Temporary Assistance for Needy Families block grant. The amount the state budgeted for the day care subsidy program in fiscal 2008-2009 was \$382,629,800, the line item for which is in the Department of Human Services budget. The DHS notes: "For most families, DHS pays less than the full cost of child care. Families are expected to pay the difference between the DHS payment and the provider's actual charge."

In Michigan, day care providers are broken up into five categories: (1) day care centers; (2) relative care providers; (3) day care aides; (4) group day cares; and (5) family day cares. Day care centers are businesses that are not run out of a home, but rather out of a stand-alone building. These centers often hire a number of employees. Over the years, organized labor has tried to organize the employees against the centers and, according to one study, managed to have 3 percent of center employees either as member of a union or under a union contract by 2004.

The National Women's Law Center identified problems that organized labor has in trying to unionize day care providers who are not employed by centers:

Child care centers may be difficult to organize, but at least there is a traditional employer-employee relationship between the owners and staff. In contrast, home-based providers do not easily fit into a legal status that permits them to unionize. The federal labor laws that cover the private sector expressly exclude both independent contractors and persons providing domestic services in another person's home from the legal definition of "employee." ... [P]roviders are either independent contractors — self-employed business owners — or, in the case of a small number of ... providers, who are providing care in a

child's home, otherwise not in an employer-employee relationship under the federal labor relations laws.

...

Even if providers were considered employees under federal labor laws, however, the entities with which they would negotiate over key elements of their work — state and local governments — are not considered employers. They are expressly excluded from the definition of “employer” under the federal labor laws, and thus state and local public-sector employees ... require specific legal authority in order to obtain collective bargaining rights with their government employer...

In other words, without additional, specific legal authority, home-based child care providers have no right to organize for the purpose of collective bargaining, and the state has no right to recognize or negotiate with the providers' representative.

Organized labor began trying to unionize non-center day care providers in 2005. It used a model created in California, Oregon and Washington related to home care workers (those who provide care in the homes of the elderly and disabled). Essentially, through legislation or a ballot initiative, organized labor had the states create an “employer” that these workers could organize against so as to seek higher pay from the states, which generally provided full payment as opposed to a partial subsidy.

The multistate attempt to organize the home day care business owners was mostly accomplished through executive orders, not legislation. In Michigan, a group calling itself Child Care Providers Together Michigan sought to become the collective bargaining agent for “[a]ll home-based child care providers including: group day care providers, family day care providers, relative care providers, and day care aides, who provide child care services under the Michigan Child Development and Care Program.” These providers receive approximately \$372 million in subsidy payments annually.¹

In April 2006, the CCPTM sought to organize against the DHS. Probably due to legal or political considerations, this attempt was abandoned. In July 2006, the DHS entered into an interlocal agreement with Mott Community College to create the Michigan Home Based Child Care Council. The DHS contended that “entering into this Agreement is necessary or appropriate to assist the Department in carrying out its duties and functions, including licensing, regulating, assisting, providing training for, and administering the subsidy payments to eligible home based child care providers.” The agreement stated that: “It is not the purpose of this Agreement to limit the selection process of child care providers by families; families will continue to select and retain the provider who best suits their needs.” The parties also ostensibly gave the MHBCCC the “right to bargain collectively and enter into agreements with labor organizations. [The MHBCCC] shall fulfill its responsibilities as a public employer subject to 1947 PA 336, MCL 423.201 to 423.217 [Public Employment Relations Act].”

In September 2006, the CCPTM filed a petition with the Michigan Employment Relations Commission seeking to organize against the MHBCCC. The CCPTM claimed that its proposed

¹ It is likely that the amount received this year will be less. The Auditor General's report indicated that those within the purported bargaining unit typically receive 83.5 percent of the total appropriation. In this case, that would be $\$382,629,800 \times 0.835$ for a total of \$319,495,883.

bargaining unit was 40,532 members. MERC conducted a mail vote in October and November. MERC reported that the result was 5,921 in favor of the union, 475 opposed. Neither Loar, Ives, Silverson or Berry believes they were aware of or voted in that election.

In 2008, the MHBCCC and the CCPTM entered into what they called "a collective bargaining agreement." The preamble to the document clearly shows that the agreement differed from a traditional collective bargaining agreement:

This agreement formalizes the unique relationship between the MHBCCC and the CCPTM ...

CCPTM and MHBCCC recognize that the implementation of various provisions in this Agreement will necessarily require the assistance and cooperation of entities that are not a party to this Agreement, primarily the Department of Human Services. CCPTM and MHBCCC agree to work together in good faith in order to secure the assistance and cooperation of the appropriate entities when required by the provisions of this Agreement.

The right of the DHS to "create and implement policies that may affect the professional standing and services provided by child care Providers" was recognized.

The document indicated that parents retained the right to hire and fire providers for any reason. Further, it was noted that termination of a provider was not a proper issue for a grievance.

The document noted that its proposed subsidy rates were dependent on the Legislature agreeing to provide funding. The MHBCCC and the CCPTM agreed to work together to lobby the Legislature to provide this funding. If the Legislature did not provide the requested amount, the parties were to meet and confer about how the available funds would be split.

"Union dues" were to come from the child care subsidy payments. If a provider did not receive a subsidy check, no dues would be collected. The dues collection began in January 2009. The DHS took out 1.15 percent of each subsidy check, providing this union (or its parent unions) with \$3.7 million annually.²

Despite the creation of various organizations as framework for the unionization effort and their designation as government employees, the home-based day care workers have no apparent employer. The MHBCCC, the CCPTM, the DHS, the state and Mott Community College have all denied being the employer.

The MHBCCC's line item was zeroed out of the 2010 budget, but the council continues to operate. In a January hearing, a DHS official refused to tell the Michigan House Appropriations Subcommittee where the MHBCCC's funding was coming from. Later, DHS officials revealed that they are reallocating funds from other parts of the DHS to maintain the MHBCCC.

The Plaintiffs

Sherry Loar is the owner of Baby Steps Childcare Center, a limited liability corporation that she operates out of her home in Petoskey, Mich. She has been nurturing children there since 1994. Her bright and airy home is a toddler's dream: bouncy swings, vibrantly colored toys, shelves of books and music to sing and dance to. Her bulletin board is covered with copies of her state certification,

² \$319,495,883 * .0115.

and she has binders filled with other documents demonstrating the coursework she has taken to keep up with everything from child development to state regulations.

At the time the suit was filed, Dawn Ives, a friend and neighbor of Sherry's, also ran a day care out of her home, a career move she says is the best decision she ever made. Ives operated Dawny Day Care from 2004 to October 2009. But economic realities made it impossible for Dawn to remain in business. With some of her older children returning to school and the parents of others staying at home after losing jobs, she decided she did not have enough business to keep her doors open. Instead, she went to work for Sherry at Baby Steps.

(The irony of this situation is that the moment Dawn ceased to be an employer, she also ceased to be an employee in the eyes of the DHS, MHBCCC and CCPTM. So, even though she is now a home-based day care employee, she is no longer considered one for the purposes of this scheme. Dawn's non-union status underscores the capricious nature of this entire process. To be an "employee," you have to be employer, and if you're an employee, you can't actually be an "employee.")

When Paulette Silverson and Michelle Berry heard about the case, they contacted the Mackinac Center Legal Foundation. Both have become clients of the MCLF.

After raising eight children of her own, Paulette felt she had a calling to start a home day care. She has operated her own business — Wonder Care — in Brighton for nearly 13 years, with a license to care for 12 children. The setting is pastoral, with horses nearby and a pool where children can learn to swim.

Michelle, owner of Berry Patch Family Childcare, has cared for children in the Flint area for six years. Because of the economic hardship of the region, Michelle has a number of clients who receive state day care subsidies. At times, Michelle has been known to purchase coats, clothing and other essentials for the children she cares for. She also accepts children early in the morning or late at night to accommodate their parents' work schedules.

Sherry, Paulette and Michelle cannot conceal the fact that they love what they do. But in December 2008, they received a rude awakening. "I had gotten the mail," said Loar. "The letter had said that the day care had become part of the union, and we would be paying union dues ... [I]t came out as a total shock.

"The next time I received my co-pay check, they took out union dues!" Loar continued. "I can't take money out of an employee's check without a signature. How can the government take money out of a paycheck? I actually work for my parents and my children. I do not work for the state."

Loar describes herself as long-time union supporter — in fact, she is married to a union member. But she insists that this situation is different.

"I'm not opposed to unions, everything has a place," said Loar. "But when we enter my door, this is my home."

The Case

When government entities act, they must do so through the democratic process, not through the creation of a shell corporation in order to aid a political ally. In the case of unionizing home-based day care providers, legislative checks and balances were bypassed because the DHS, UAW and

AFSCME wanted to achieve a particular outcome. The result is bad public policy enacted improperly.

These women run businesses out of their homes. They are not employees. They are not hired and fired by the state. The DHS, the Child Care Providers Together Michigan union, the UAW and AFSCME are taking money as "union dues" that these home-based day care providers have earned, despite the fact that this field does not lend itself to traditional collective bargaining.

For these reasons, the Mackinac Center Legal Foundation seeks a writ of mandamus to prevent DHS officials from taking out "dues." Issuance of a writ of mandamus is proper when a state official has a clear legal duty to either take or forgo certain actions.

The main arguments presented in the case are that the plaintiffs, as home-based business owners, are really independent contractors and not government employees of the MHBCCC, and that an interlocal agreement cannot expand the definition of public employee beyond what the Legislature has set.

Under common law, public-sector collective bargaining was illegal. Michigan's 1963 Constitution contained a provision, art 3 § 7, that stated the common law remained in force unless altered or abrogated. A second provision, art 1 § 48, allowed the Legislature to enact laws related to public sector collective bargaining of employees not under the jurisdiction of the Civil Service. It was under this authority that the Legislature, in 1965, enacted the Public Employee Relations Act. Under the terms of PERA and under the case law, the plaintiffs in this case are not government employees. In *Morin vs. Department of Social Services*, 134 Mich App 834 (1984), the Michigan Court of Appeals, in a similar context related to workers' compensation, held that a home-based day care provider was an independent contractor, not an employee.

A Rhode Island court faced the same issue presented in *Loar v. DHS*. That court ruled that the provider was an independent contractor, not a government employee:

A provider's work is done at the provider's home with the provider's furnishings. The provider furnishes its own instrumentalities and tools. All of the work is performed at the provider's private residence, and the State does not have the right to assign any children to the provider. The provider unilaterally controls the hours and days of operation and may unilaterally change them at any time. The provider unilaterally decides when to take vacation, how much vacation time to take, and how often to take vacation. The provider decides whom to hire and how to pay assistants . . . Finally, the State is not in business with home day care providers, and there is no tax involvement by the State other than its duty to report to the IRS any funding forwarded to a provider through DHS.

The fact that the home care providers were regulated did not transform them into employees:

Although the Court recognizes that home day care is a highly regulated industry, substantial regulation does not necessarily equate to the control required to create an employer/employee relationship between the State and anyone who chooses to become a provider.

Article 7 § 28 of Michigan's Constitution does allow for interlocal agreements, like the one entered into by the DHS and Mott Community College to create the Michigan Home Based Child Care Council. As a primary matter, these agreements are supposed to require two local governments, not

just a state agency and a local government. But even if a state agency and a single local unit of government were proper parties, they could not exercise power that is constitutionally exclusive to the Legislature. The Legislature is the sole entity that can act to expand the number of employees that fall under PERA; under Michigan law, the executive branch cannot take such action unilaterally. Since the Legislature has not enacted a law to cover home-based day care providers, an executive agency cannot enter into a contract whereby these providers can be organized.

It appears that Mott Community College did not serve any role aside from giving the DHS an entity to contract with so as to create an employer that the CCPTM could organize against. The MHBCCC has its office in Lansing, and there is no indication that Mott has any presence in the listed employees at MHBCCC.

In mid-October, the DHS and its director filed a motion seeking to have the suit dismissed on procedural grounds. Although not required to, the DHS could have defended the merits of its actions — i.e. claim that the use of the interlocal agreement to allow collective bargaining for home-based day care providers was proper. The defendants chose not to do so. The arguments the DHS and its director did make would prevent almost any use of mandamus no matter how egregious the governmental action. On Oct. 28, the Mackinac Center Legal Foundation filed a response brief highlighting the flaws in the defendants' arguments. After the DHS and the legal foundation each filed one more brief, the court dismissed the case without explanation in December 2009.

Current Status

Since the Michigan Court of Appeals denied the Mackinac Center Legal Foundation lawsuit, Wright is considering options for further action. In the meantime, state legislators have introduced at least five bills seeking to end the forced unionization of individuals whose "private employment compensation" comes from a government subsidy.